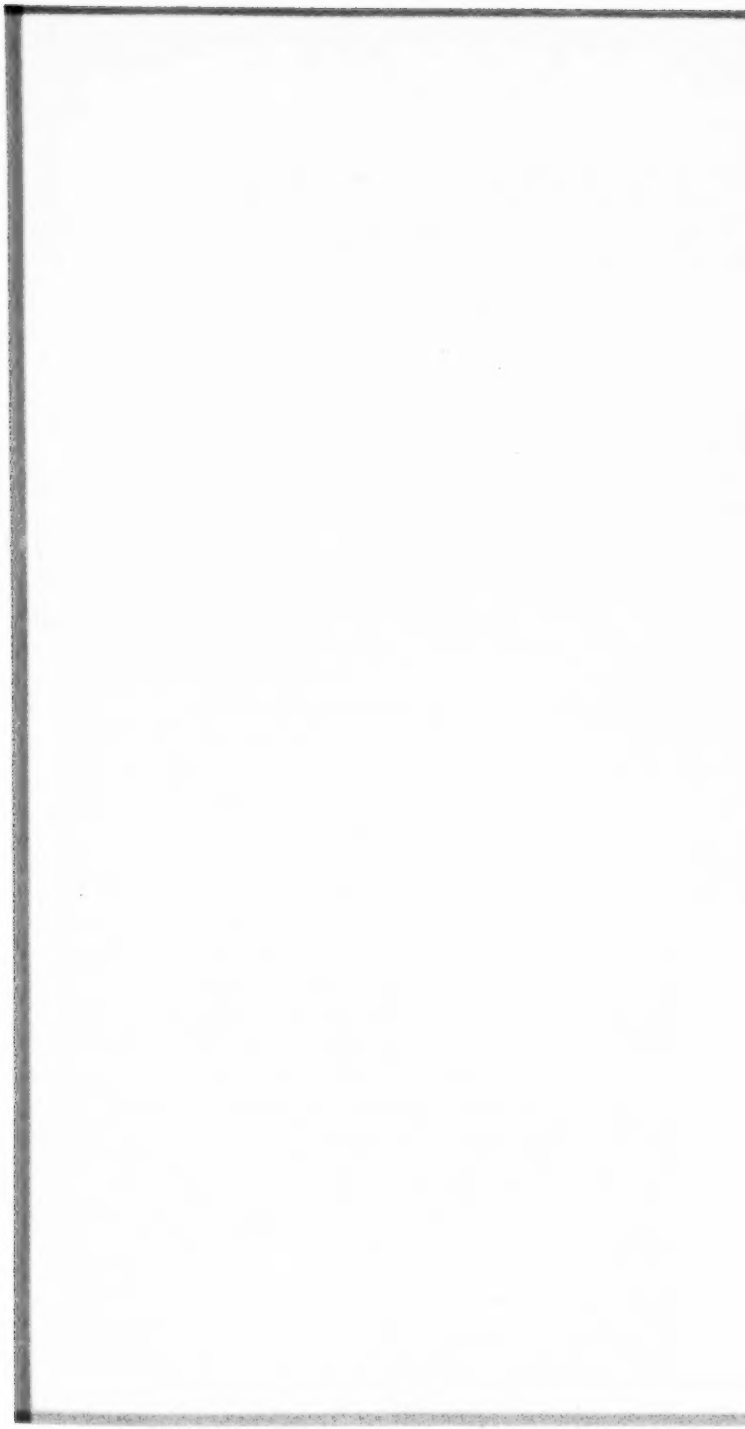

T. 106.

Brf. of Davis, Miller, Choate, Barker, Jenkins & McGowan for Appellee (on reargt.)

SUPREME COURT

Filed March 2, 1898.

OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. ~~135~~ 106.

THE NEW YORK INDIANS, APPELLANTS,

vs.

THE UNITED STATES.

ADDITIONAL BRIEF FOR APPELLANTS ON REARGUMENT.

HENRY E. DAVIS,
GUION MILLER,
For the Appellants.

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RYAN, THE PRINTER, ONEIDA, N. Y.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1896.

No. 415.

THE NEW YORK INDIANS, APPELLANTS,

vs.

THE UNITED STATES.

ADDITIONAL BRIEF FOR APPELLANTS ON REARGUMENT.

I.

Was the treaty of Buffalo Creek of January 15, 1838, between the United States and the appellants duly ratified by the United States Senate, and proclaimed by the President of the United States?

And was the treaty thereafter recognized by both of the parties thereto as binding on them and governing their relations and obligations to one another?

A brief and concise statement of the action of the Executive, Legislative and Judicial Departments of the Government, in recognition of the existence and validity of the treaty of January 15, 1838, will be given from the time of its final consideration by the United States Senate, and its ratification by the Senate, and its proclamation by the President, to the passage of the Enabling Act, January 22, 1893, giving this Court jurisdiction to review the action of the Court of Claims, and determine the justice and validity of the appellants' claim.

In making such reference to statutes, and documents, we shall do so in their chronological order, and care will be taken in making extracts therefrom, and to state the occasion and purpose of such action, to indicate their significance.

II.

March 2, 1839.

It appears from the Executive Journal of this date that the Senate, by a two-thirds vote, adopted the following resolution: (See Record Finding 10, pp. 10 to 18.)

"Resolved, That whenever the President of the United "States shall be satisfied that the assent of the Seneca Tribe "of Indians has been given to the amended treaty of June "11, 1838, with the New York Indians, according to the "true intent and meaning of the resolution of the Senate "of the 11th of June, 1838, the Senate recommends that "the President make proclamation of the said treaty and "carry the same into effect."

On the passage of said resolution the following order was made, viz.:

"*Ordered*, That the Secretary lay the said resolution "and the treaty transmitted to the Senate with the mes- "sage of the 22d of January last, before the President of "the United States."

2.

March 25, 1840.

It appears from the same Senate Journal of this date that the United States Senate passed the following resolution:

"*Resolved*, That in the opinion of the Senate, the treaty "between the United States and the Six Nations of New "York Indians, together with the amendments proposed "by the Senate of the 11th of June, 1838, have been satis- "factorily acceded to, and approved of by said tribes, the "Seneca Tribe included, and that in the opinion of the "Senate the President is authorized to proclaim the treaty "as in full force and operation.

"Attest: ASBURY DICKINS, Secretary."

(See Record, p. 31.)

3.

April 4, 1840.

All the Indian parties to said treaty, having "acceded to, and approved of the treaty with the amendments proposed by the Senate of the 11th of June, 1838," the President, in pursuance of said Senate Resolution, on this day made "Proclamation of the Treaty of Buffalo Creek" in the following language, viz: (See Record, p. 17.)

"Martin VanBuren, President of the United States of "America, to all and singular to whom these presents shall "come,

" GREETING :

" Whereas, a treaty was made and concluded at Buffalo, " in the State of New York, on the 15th day of January, " one thousand eight hundred and thirty-eight, by Ransom " H. Gillet, a Commissioner on the part of the United " States, and the Chiefs, head men and warriors of the " several tribes of the New York Indians, assembled in " council ;

" And whereas, the Senate did, by a resolution of the " 11th of June, one thousand eight hundred and thirty- " eight, advise and consent to a ratification of said treaty " with certain amendments, which treaty, so amended, is " word for word as follows, to wit : * * * *

" And whereas the Senate did, on the 25th of March, " one thousand eight hundred and forty, resolve 'that in " the opinion of the Senate, the treaty between the United " States and the Six Nations of New York Indians, together " with the amendments proposed by the Senate of the 11th " of June, 1838, have been satisfactorily acceded to and " approved of by said tribes, the Seneca Tribe included, and " that in the opinion of the Senate the President is author- " ized to proclaim the treaty as in full force and opera- " tion.'

" Now, therefore, be it known that I, Martin Van " Buren, President of the United States of America, do, " in pursuance of the resolution of the Senate of the 11th " of June, one thousand eight hundred and thirty- " eight, and 25th day of March, one thousand eight " hundred and forty, accept, ratify and confirm said treaty " and every article and clause thereof.

" In testimony whereof I have caused the seal of the " United States to be hereunto affixed, having signed the " same with my hand.

" Done at this City of Washington, this 4th day of April,
" one thousand eight hundred and forty, and of the Inde-
" pendence of the United States the sixty-third.

" By the President, M. VanBuren.

[SEAL] " John Forsyth,

" Secretary of State."

4.

April 4, 1840.

This treaty, on this day, became the supreme law of the land, made so by the constitution of the United States, behind which courts can not go.

The treaty became a corporial part of the 7th Vol. U. S. Statutes at Large. We then have the further proof—if statutes are not to be ignored—that the treaty, as amended, was signed by the parties, attested by various witnesses, assented to by the Six Nations, *separately*: By the Senecas, September 28, 1838; by the Oneidas, August 9, 1838, for themselves and their parties; the Tuscaroras, August 14, 1838; the Cayugas, August 30, 1838; the St. Regis, October 9, 1838; the Onondagas, August 21, 1838. (7 Statutes, 550 to 564.)

5.

After the ratification of this treaty of Buffalo Creek, the New York Indians—there being 1,300 of them in possession of the Green Bay lands—withdrew to the reservation of 65,000 acres, reserved in Article 1st of said treaty, and delivered up 500,000 acres of land to the United States. Thereupon the United States surveyed, made part of the public domain, and sold, or otherwise disposed of, and conveyed the same, and received the consideration therefor. (Record findings 14, 15, p. 20.)

Each party to the treaty recognized the validity of the treaty—the one in surrendering the possession of the lands they had ceded, and the other by accepting, receiving, surveying and selling the same, and receiving and appropriating the proceeds thereof.

6.

May 20, 1842.

Questions and differences having arisen between the Chiefs and head men of the Seneca Nation of Indians, *or some* of them (7 Stat. 587) for the purpose of a settlement thereof a treaty was made and concluded on this day between the United States and the Seneca Nations, one of the parties to the treaty of Buffalo Creek, in reference to some of the provisions of that treaty in which the treaty of Buffalo Creek was referred to "as having been duly ratified" in the following language, viz.:

" Whereas, a treaty was heretofore concluded, and made
" between the said United States, and the chiefs, headsmen
" and warriors of the several tribes of New York Indians,
" dated the 15th day of January, in the year one thousand
" eight hundred and thirty-eight, which treaty having
" been afterwards amended was proclaimed by the Presi-
" dent of the United States, on the 4th of April, one thou-
" sand eight hundred and forty, *to have been duly ratified.*"
(7 Stat. 586, preamble.)

The said treaty of Buffalo Creek is further recognized, and held valid as modified in articles "Second and Third." (p. 590, 7 Stat.)

By the said treaty of May 20, 1842, which was ratified, confirmed and proclaimed August 26, 1842, harmony was restored, and all the tribes were fully satisfied. Thereafter no protest was made by the Indians against the treaty of

1838. (See Finding 11.) The treaty of 1842, thus recognized the validity of the treaty of 1838, as having been duly ratified.

7.

The United States, for the purpose of carrying out the provisions of these treaties, caused a tract of land in the then Indian Territory, (now the State of Kansas) to be surveyed, marked, and set apart to the New York Indians, containing, as supposed, 1,824,000 acres of land, and being 320 acres for each soul of the New York Indians, "residing in the State of New York and in Wisconsin, or elsewhere in the United States." (Art. 2, 7 Stat. p. 551.) These lands were designated upon the maps of said survey, filed in the War Department, "The New York Indian Reserve." This was a further declaration of the validity of the treaty of 1838.

8.

June 7, 1842.

The Commissioner making the treaty of May 20, 1842—Hon. Ambrose Spencer—made his report, dated May 23d, to T. Hartley Crawford, Commissioner of Indian Affairs, with the treaty annexed, approved therein of the treaty of January 15, 1838, and declared the same, except as modified by the treaty of May 20, 1842, *as remaining in full force.*

On this day, June 7th, the Commissioner of Indian Affairs transmitted the same to Hon. John C. Spencer, Secretary of War, with his report, in which he recognizes the validity of the treaty of January 15, 1838, and among other things he says, referring to said treaty, viz:

"The United States, in having undertaken to pay a "large sum money, and to appropriate an extensive tract

" of country west of Missouri by the treaty of 1838, which, " except as modified by the arrangements now submitted, *will* " *remain in force.*"

On the day following, and June 8, the Secretary of War transmitted said reports to the President of the United States. In concluding his communication he said:

" The accompanying report of the Commissioner on the " part of the United States, by whom the treaty was " negotiated and concluded, and the communication of " the Commissioner of Indian Affairs so fully explain the " *fairness* of the transaction and the operation of the treaty " upon the interests of the United States, that I do not " deem it necessary to add any remarks of my own, except " to express the great gratification felt that the negotiation " which has resulted in this treaty has been conducted " in a manner so honorable and so just." (See Record in Court of Claims, p. 155 and 156. The Commissioner of Indian Affairs' Report of June 7, 1842, to the Secretary of War.)

9.

March 3, 1843.

Prior to this date "Indians of the Seneca, Cayuga and " Onondaga Tribes applied for removal to their new " homes." In pursuance thereof, on the day last aforesaid, Congress, for the purpose of carrying out the provisions of the treaty of January 15, 1838, passed an act, which was approved by the President and became a law, in the following words, to wit:

" An act for the removal to the west of the Mississippi " of two hundred and fifty of the New York Indi- " ans, of the Seneca, Cayuga and Onondaga Tribes, " and for fulfilling other treaty stipulations with them

" provided that so many are willing to emigrate, for the " said half calendar year, twenty thousand four hundred " and seventy-seven dollars and fifty cents." (Sec. 5 Stat. 612. Record p. 21, finding 18. Sen. Doc. 13, 34 Cong., 3d Session.)

It is seen that three years after the ratification of the treaty both parties to it recognized its validity, and its binding obligations on them.

10.

September 12, 1845.

The President appointed Dr. Abraham Hogeboom an agent for the removal of the Indians to Kansas, for the purpose of carrying out the provisions of the treaty of 1838. (See Record, p. 19, finding 12. Report of H. Price, Commissioner of Indian Affairs, to the Secretary of the Interior, Feb. 9, 1883, found 1st Recd. Court of Claims, p. 169, 171.) The agent started in the spring of 1846, with a party of about 200 Indians, arriving in Kansas, June 15, 1846. The sum of $9,464.08 was expended in the removal of the party.

Again, we notice that after the laps of the first five years, each party to the treaty once more acknowledged the validity and binding force of that treaty. (Record 19, finding 12.)

11.

November 24, 1845.

" Prior to this date, some of the New York Indians had " applied to the Indian office for the proper steps to be " taken for their emigration. It was not deemed expedi- " ent to enter into any arrangements for this purpose then, " etc." (Record, p. 19, finding 12. Sen. Doc. 13, 34th Cong. 3d Session.)

12.

June 27, 1846.

For the further purpose of carrying out the provisions of the treaty of 1838, Congress passed a law, which is in the following words: An act "For the payment to the "American party of St. Regis Indians, stipulated in sup- "plimental article to the treaty with the Six Nations of "New York, of the 15th of January, 1838, $1,000," (7 Stat. 561) "For payment to Wm. Day and the chiefs of the "Orchard party of the Oneidas, stipulated in the 13th "Article of the treaty with the Six Nations of New York, "15th January, 1838, $2,000," (9 Stat. 33, 34. Rec., p. 21, finding 18.) This was six years after the proclamation of the treaty. Once more, and six years after the ratification of the treaty of 1838, the Executive and Legislative branches of the Government, confirm the validity of said treaty. No forfeiture or abandonment of its obligations were recognized.

Again:

June 27, 1846.

By the terms of the treaty of 1842, Article 3, provided that certain moneys were to be paid to the President in trust for the Senecas, and the sum of $75,000 was to be paid over to him. Thereafter, by Section 2, of the Act of 1846, Chap. 34, an appropriation was made in the following words: "Section 2. And be it further enacted, "that "the sum of seventy-five thousand dollars, heretofore "paid to the President of the United States, under the treaty "made with the Seneca Indians of New York, in the year "eighteen hundred and forty-two, for the benefit of said "Indians, and the stock in which the same may have been "invested, shall be, and the same is hereby taken absolutely "to the use of the United States, in accordance with the

" prayer of said Indians; and it shall be the duty of the " Secretary of the Treasury to cancel the said stock, and " place upon the books of his department the amount of " seventy-five thousand dollars to the credit of said Indians, " upon which sum interest shall thereafter be paid to them, " at the rate of five per centum per annum; Provided, that " any interest which may be due and unpaid on said stock, " at the time of its cancellation, shall be forthwith paid to " them."

This act is a distinct recognition by Congress of the existence and valiity of the treaty of 1842, which amended the treaty of 1838 in essential particulars, and it must be taken as a recognition of the validity and existence of the treaty of 1838 at the time of this enactment.

13.

July 29, 1848.

The United States, recognizing the valiidity of the treaty under consideration, for the purpose of carrying out other provisions of the same, on the 29th of July, 1848, and over eight years after the proclamation of the treaty, passed an act, which was approved by the President, in the following words and figures, to wit:

An act "to pay the Tuscaroras for proportionate share of " the fund for three thousand dollars due to the Tuscaroras, " as provided in the 14th Article of the treaty with the Six " Nations of New York Indians of January 15th, 1838, $88; " for payment to James Cusick, Tuscarora Chief, as stipu- " lated in Schedule B, appended to the treaty with the Six " Nations of New York of 15th of January, 1838, $120." (9 Stat. 161, ch. cxxiii. 7 Stat. 554, Art 14, p. 556. Record, p. 21, finding 18.) There is no forfeiture, recision or abandonment of the treaty recognized or claimed at this period, eight years and four months after the proclamation of the treaty of 1838.

14.

May 30, 1854.

A law was passed by Congress, and approved by the President, for the temporary government for the territory of Kansas, reserving therein the rights of the Indians in their "New York Kansas Reserve" in the following words, viz: (Sec. 10, Stat. 283, 284. Sec. 19.)

"Provided, however, that nothing in this Act contained "shall be construed to impair the rights of persons or prop- "erty now pertaining to the Indians of said territory, so "long as said rights shall remain unextinguished by treaty "between the United States and said Indians, as to include "any territory which by treaty with any Indian Tribe is "not without the consent of such tribe to be included with- "in the territorial lands or jurisdiction of any state or "territory."

The New York Indians' Reserve of 1,824,000 acres lays in the south-eastern part of the now State of Kansas.

15.

March 3, 1857.

Congress, in recognition of the validity of the treaty of Buffalo Creek, and for the purpose of carrying out the provisions of the said treaty, passed a law, which was approved by the President, in the following words and figures, to wit: (See 11th Stat. 184; Chap. 90, Record, p. 21, finding 15.)

"An act for the payment of this amount to William "King, in accordance with schedule C, (7 Stat. 557) "attached to the treaty with the Six Nations of New York, "proclaimed April 4, 1840, in accordance with the resolu- "tion of the Senate, March 25th, 1840, $1,500."

It will be observed, that this unequivocal recognition,

and formal avowal of the efficacy of the treaty, by the Legislative and Executive branches of the Government, *made seventeen years* after the ratification of the treaty of January 15, 1838, and more than nineteen years after the date of the treaty, is uncontestable proof that the treaty was then operative and binding on the parties thereto, that there had been no *abandonment, forfeiture, recision* or *release*, but was still *valid*—the Supreme Law of the Land.

At that very time this treaty was before this Court, in the case of Fellows vs. Blacksmith, (19 How. 366); and two days thereafter, to wit:

16.

March 5, 1857.

This Court handed down its decision, declaring that this treaty was valid, and binding on the United States, and *to be* the Supreme Law of the Land, and that the courts cannot go behind it for the purpose of annulling its effect and operation—that it was obligatory upon the United States, to carry it into execution. (See 19 How. 366. 21 How. 371.)

Up to this period, and seventeen years after the proclamation of the treaty, the Executive, Legislative and Judicial Branches of the Government had recognized and acknowledged the validity of the treaty, and the obligation resting upon the Government to perform the unexecuted stipulations of the same.

17.

November 5, 1857.

After the decision of this Court, referred to above, and reported in the 19th of Howard, 366, and on the 5th day of November, 1856, a treaty was made and concluded with the Tonawanda band of the Seneca Nation of Indians, and ratified by the Senate, June 4th, 1858, and proclaimed by the

President March 31st, 1859, which fully recognized the treaty of 1838 as then in force and effect and binding on the United States. It is recited in the preamble of the treaty as follows :

" And, whereas, in and by the said treaty there was sur-
" rendered and relinquished to the United States 500,000
" acres of land in the territory of Wisconsin ; and whereas,
" the United States in and by said treaty agreed to set
" apart for said Indians certain lands in the Indian Terri-
" tory immediately west of Missouri, and to grant the same to
" them to be held and enjoyed in fee simple, the quantity
" of the said land being computed to contain 320 acres to
" each soul of said Indians, but it agreed that any indi-
" vidual or any number of said Indians might remove to
" said territory and thereupon be entitled to hold and enjoy
" said lands and all the benefits of such treaty according to
" numbers respectively."

" And whereas, the United States did further agree to
" pay the sum of $400,000.00 for the removal of the Indi-
" ans to the said territory and for their support and assis-
" tance during the first year of their residence in the said
" territory." In Article 1, of the enacting clauses, is the release, as follows :

" Hereby surrender and relinquish to the United States
" all claims, separately and as a band of Indians, as part of
" the Seneca Nation, all the lands west of the State of Mis-
" souri and all right and claim to remove thither and for
" support and assistance after such removal, all other claims
" against the United States under the aforesaid treaty of
" 1838 and 1842, subject, however, to such moneys as they
" may be entitled to under such treaty as may be payable
" to the said Ogden and Fellows."

In Article 2, " In consideration of the aforesaid sur-

" render and relinquishment, the United States agree to " pay and invest, in the manner heretofore specified, the " sum of $256,000. for the said Tonawanda Band of " Indians."

In Article Six, it is provided, " That the portion of the " said sum of $256,000, not expended in the purchase of " lands as aforesaid, shall be invested by the Secretary of " the Interior in stock in the United States in some other " State and the interest thereon be paid to the Indians."

This provision of the treaty secured to the Tonawanda band of Indians their proportionate share of 1,824,000 acres of land set apart as a reservation for the New York Indians and all their part of the $400,000, payable under Article 15 of the treaty. (Record, page 20, finding 16.)

Do not these provisions make it clear beyond controversy that the treaty of 1838 had not been abandoned, rescinded, or forfeited, but remained valid and in full force?

The " New York Indian Reserve" in Kansas, had been occupied by squatters. " The whites had obtained posses- " sion, and the Government could not drive them off and " keep them off." (See Ex. Doc. Y., p 10. 40 Cong. 3 Sess filed in Court of Claims January 9 1894.) The Government had determined to seize these lands, sell them to the squatters, and pay indemity to the New York Indians at the rate of $1.25 per acre. (See Cong. Globe of 1858-9 p 791, and 1634, etc.) This change of policy led to this treaty of 1857 as the first step towards the payment of indemity. The Court below said:

" The Tonawandas had a right, even in 1857, under " the treaties of 1838 and 1842, to call upon the United " States to aid their removal to Kansas lands, and to per- " form its other obligations as to their settlement there, or " else to Compromise for a reasonable sum. The latter

" course was adopted, and full satisfaction made for the error " of judgement on the part of the United States. (Rec 39.)

Clearly, there was no difference between the Tonawanda band of Senecas and any other band, tribe or nation of the New York Indians, or their claims to indemnity under the treaty. The attempt to show a difference, is visionary. The four bands of Senecas stood on an equal footing with respect to the treaties of 1838 and 1842. And the members of the Six Nations, stood on an equal footing with each other. The Tonawandas had never demanded removal; the others had.

The policy of indemnity was inaugurated by the treaty of Nov. 5, 1857. The Court below further says :

" Wherefore, when this action was begun" (in 1859) " and for years before, the United States were unable by " *reason of their own acts,* to carry out the agreement of " 1838." (See Rec. 35, 21, finding 17. Cong. Globe, Part 2, 2d Sess. 35 Cong. p 1634 and 5.)

Following this change of policy of removal, to the payment of indemnity and on

18.

May 24, 1858

The following : "S. Bill 389" was passed in the Senate in the absence of the New York Senators. (See Cong. Globe 1858 and 9, p. 1634 and 5.) " A Bill : Providing " for the allotment of lands to certain New York Indians " and for other purposes :

" Be it enacted by the Senate and House of Representa- " tives of the United States of America in Congress assem- " bled that the President be, and he is hereby directed, as " soon as practicable, to cause three hundred and twenty " acres, or one-half section of land, to be set apart and

" allotted to each individual Indian, entitled to lands in " the tract set apart for the use of the New York Indians, " and now residing thereon, by the treaty of Jan. 15th, " 1838, made and concluded at Buffalo Creek, in the State " of New York, and the treaty made at the same place on " the 20th day of May, 1842, said land to be selected " within said Reserve in Kansas Territory, in conformity to " the legal sub-division of the public surveys, and so as to " include improvements, (if any there be) of each Indian, " and patents for the same shall be issued to the heads of " each family,

" When the selections shall have been thus made and " allotted, the remainder of said reserve shall be considered " a part of the public lands, and shall be subject to settle- " ment, pre-emption, and entry, as other lands belonging " to the United States."

19.

February 3, 1859.

This bill came up in the House of Representatives, and was passed as amended, in the following form :

" Be it enacted by the Senate and House of Representa- " tives of the United States of America, in Congress assem- " bled, That the President be and he is hereby directed, as " soon as practicable, to cause three hundred and twenty " acres, or one-half section of land, to be set apart and " allotted to each individual Indian entitled to lands in the " tract set apart for the use of the New York Indians who " removed under the provisions of the treaties hereinafter " referred to, and to their children, in the tract of land set " apart for the use of the New York Indians by treaty of " January 15th, 1838, made and concluded at Buffalo " Creek, in the State of New York, and a treaty made at " the same place on the 20th day of May, 1842,. said lands

" to be selected within said reserve in Kansas Territory, in " conformity to the legal subdivisions of the public surveys, " and so as to include the improvements (if any there be) " of each Indian, and patents for the same shall be issued " to each individual Indian adult or to heads of families for " themselves and their minor children, they to locate their " lands within the space of one year from the passage of this " act; and when the location shall have been thus made and " allotted, and after the expiration of said year the remain- " der of the reserve shall be considered a part of the public " lands, and shall be subject to settlement, pre-emption and " entry, as other lands belonging to the United States, but " no settlements, other than by the Indians above referred " to, shall be made on said reserve for the space of one " year, from and after the passage of this act. All settle- " ments heretofore made on said reserve shall be recognized " from the date of such settlement, and be entitled to pre- " emption, the same as if the said lands had been Government " lands, and subject to settlement: Provided that the " Indians named shall have precedence over any other " settler where the same may come in conflict.

" Sec. 2. After paying all the monies necessary for car- " rying out the provisions of this act, the remainder of all " monies accruing from the sales by pre-emption, private " entry, or otherwise, of any land within the tract or reserve " above named, *shall be paid into the Treasury of the United* " *States and kept as a separate and distinct fund; and held* " *subject to any future action of Congress in relation to said* " *New York Indians, or to the provision of any treaty made,* " *or hereafter to be made, with said Indians, or any of them, in* " *reference thereto.*"

Sec. 3 has reference to the jurisdiction of the District Courts of the United States for the Territories of Kansas

and Nebraska. (Cong. Globe, Part 1, 1st Sess. 35 Cong. p. 791.)

This bill as amended, and on

March 3, 1859,

Came up for concurrence in the Senate and its passage moved, when Senator King of New York moved the following amendment to said bill, viz: (Cong. Globe, Part 2. 2d Session, 35 Cong., p. 1634.) "By striking out all after "the word 'who' in the first line of the House amend- "ment and inserting:

"Is of or among the Indians and tribes provided for by "the treaty of January 15th, 1838, made and concluded at "Buffalo Creek, in the State of New York, and the treaty "made at the same place, May 20, 1842, and as soon as "the $400,000 which it is provided by the 15th Article of "the said treaty, shall be appropriated for aid by the "United States in the removal of the said New York Indi- "ans, and for their support and benefit after removal shall "be provided, the President shall appoint a Commissioner "to carry out the provisions of the treaty, who shall ap- "point a suitable day and time within which the said New "York Indians shall remove to the lands set apart for them "in accordance with the provision of the said treaty, or "forfeit their right to the lands, and of the day and time "so appointed, immediate information shall be given to "the said Indians by the President." (Ibid, p. 1634.)

Senator Seward of New York, in an able speech, defended the title and rights of the New York Indians in said lands and the subject was permitted to be dropped by common consent.

But thereafter, and on the same day, to wit:

20.

March 3, 1859.

By the treaty of 1857, article 2, the United States agreed to pay to the Tonawanda band, $256,000, in consideration of their surrender and relinquishment of their right under the treaty of 1838 and 1842 and to carry into effect this stipulation, Congress passed, and the President approved of the law, in the following words and figures, to wit :

" Tonawandas—for payment and investment of this " sum for the surrender and relinquishment of lands west " of the State of Missouri, per 2d article of the treaty of " November 5, 1857, $256,000." (11 Stat. 436, Cong. Globe, Part 2d, 2d Sess. 35 Cong., p. 1,638 ; Appendix to same, p. 359.)

21.

February 21, 1859.

The treaty of Buffalo Creek was before this Court in the case of State of New York vs. Dibble (21 How. 371) which recognized the validity of said treaty, and declared " That " the treaty can be carried into execution only by the " authority or power of the Government which was a party " to it."

Thereafter and on

22.

March 3, 1859.

Congress fully, and again acknowledged the validity of the treaty of 1838, and expressly declared, in the "Sundry Civil Bill" of this date in the following words: (See 11 Stat. 430, 431.)

That in all cases where, by the terms of any Indian treaty in Kansas Territory, etc., "the Secretary of the In- " terior is hereby authorized," then follows this provision:

" That nothing herein contained shall be construed to apply " to the New York Indians, or to affect their rights under " the treaty made by them in 1838, at Buffalo Creek."

In the passage of this Bill, Congress and the President not only recognized the rights of the claimants, but it protected them.

It is well settled that repeated acknowledgements of the rights and interests of others are held conclusions of law. (Bloodgood v. Bruen, 8 N. Y., 362; DeForest v. Warner, 98 N. Y., 221; 73 N. Y., 189.) Again:

23.

March 21, 1859.—

And only seventeen days after these repeated acknowledgments of the validity of the treaty, on March 3d 1859, as above stated, and the repeated acknowledgements by the Executive, Legislative and Judicial branches of the Government. Joseph Thompson, then Secretary of the Interior, took the matter into his own hands—Congress having adjourned—and contrary to the provisions of law, and the purpose of Congress, (as we have seen) issued his order of spoliation; and yet recognizing the existence of the treaties and the rights of the New York Indians, as follows:

" *It has been decided*—that the tract of land in Kansas " Territory, known as the New York Indian Reserve, shall " be surveyed with a view of alloting a half section each " to such of the New York Indians as may have resided " there under the provisions of the treaties of January 15, " 1838, and May 20, 1842, after which the residue of the " reserve will become a part of the public domain," etc.

While no officer of the Government was invested with such power, the action of the Interior Department can only

be reconciled with the fact that the Government had changed its policy of removal to one of indemnity. (Rec. finding 17, p. 21.)

After the issuing of this order to the Commissioner General of the Land office, the New York Indians, in 1859,

" Employed counsel to prosecute their claims in the " premises, asserting, in the powers of attorney, that the " United States had seized upon the said lands, contrary " to the obligations of said treaty, and would not permit " the said Indians to occupy the same or make any dispos- " ition thereof. The said Indians have since asserted " their said claims." (See finding 17, Rec. p. 21, old Rec. 139.)

It will be observed that from the time of the ratification of the treaty, April 4, 1840, to the issuing of the order of spoliation, and the employment of counsel, as aforesaid by the claimants, in 1859, there had been no treaty made, or contract executed for an abandonment, recision, or waiver of appellants' rights, nor had there been a forfeiture claimed by the Government during that period of nineteen years.

24.

December 3 and 17, 1860.

It is true that in view of the steps taken by Secretary Thompson aforesaid, President Lincoln, (and while counsel for the New York Indians were prosecuting their claim for indemnity) issued his proclamation, offering these lands for sale. J. D. C. Atkins, Commissioner of Indian Affairs, on November 24, 1886, made the following report among other things to the Court of Claims: (See 1st Record, p. 141; also Record, p. 21, finding 17.)

" The lands secured to the New York Indians by said " treaty (1838, except those allotted to thirty-two persons)

" were offered for sale by proclamation of the President, " dated December 3 and 17, 1860, and since that time, at " least, have been included in the territory or State of " Kansas."

In these proceedings, up to this date, the Government had not claimed an abandonment, rescision, forfeiture or waiver, but the Government proceeded—all the time recognizing the validity of the treaty and the rights of the claimants—upon the ground that indemnity was due appellants; and *that* is seen by the subsequent action of President Lincoln, in the appointment of a Commissioner, to negotiate with the New York Indians, by treaty, for a settlement of their claims; and in the seubsequent acts of the Executive, Legislative and Judicial branches of the Government.

25.

January 29, 1861.

Congress passed an act admitting Kansas into the Union as a State, which act contained this provision: (See 12 Stat. 126.)

" *Provided*, That nothing contained in the said Constitu- " tion respecting the boundary of said State shall be con- " strued to impair the rights of person or property now " pertaining to the Indians in said Territory so long as " such rights shall remain unextinguished by treaty be- " tween the United States and such Indians, or to include " any Territory which by treaty with such Indian tribes, " is not without the consent of said tribes, to be included " within the territorial limits or jurisdiction of any State " or Territory; that all such territory shall be excepted " out of the boundaries and constitute no part of the State " of Kansas until said tribes shall signify their assent to " the President of the United States to be included within " said State."

Why was said provision made? Because Article 4 of the treaty of 1838 provided as follows:

"The lands secured to them by patent under this treaty "shall never be included in any State or Territory of this "Union."

That "*Proviso*" was for the benefit of the New York Indians, and a distinct recognition by Congress and by the President, of the then existing rights of said Indians in the "New York Indian Reserve." This was 21 years after the ratification of the treaty, and at a time Counsel was prosecuting their claim for indemnity. The "Proviso" furnishes proof also, that the rights of the New York Indians in said Reserve, had not been "extinguished by treaty," nor by forfeiture, abandonment, recision or waiver, nor the Government released from the unexecuted stipulations of said treaty. This is also confirmed in the succeeding paragraph.

26.

September 2, 1863.

The President—who issued his proclamation December 2 and 17, for the sale of said lands—recognizing this claim for indemnity, appointed a Commissioner, Dole, to proceed to Kansas, to negatiate a treaty with such of the New York Indians who had gone there under the treaty of 1838, to extingush their title in the Kansas lands, and to pay them indemnity, based on the treaty of November 5, 1857, with the Tonawandas. A treaty with them was made and concluded, and the President transmitted it to the Senate, where it was suspended "until a treaty could be concluded "with all the New York Indians, to arrange all matters "between them and the United States which required ad-"justment." (See Rep. Com. Indian Affairs, of 1863, p. ——; Old Record, p. 124; Report of N. G. Taylor, Com. of Ind.

Affairs; Ex. Doc. Y., p. 2; 40th Cong., 3 Sess.) This was a distinct recognition of the existence and force of the treaty by the President and Interior Department, and of the rights of appellants to indemnity. Again,

27.

April 26, 1864.

The Secretary of the Interior, Usher, addressed an official communication to Judge George Barker, of Fredonia, N. Y., in which he stated:

"I thought it proper to advise you, as the agent of the "New York Indians, that it is the *desire* of the Govern- "ment to *extinguish their title* to a tract of land in Kansas, "ceded to them by the treaty of January 15, 1838; that a "treaty has already been made for that purpose with the "fragments of bands of those Indians residing in Kansas, "and that a similar one will be made with those in New "York abating the commutation, or transportation thither, "if it be the pleasure of the Indians in New York "to agree to those terms, and that the Department "will detail Mr. Mix, or other competent person to "meet the New York Indians in council to agree upon "terms of the proposed treaty, upon proper notice "being given of their meeting at any time within "three weeks from this date." (See 1st Rec. Court of Claims, p. 137.)

In pursuance thereof, and on the 5th day of May, 1864, President Lincoln—pursuing the new policy of taking their lands, and paying indemnity, appointed Hon. Charles E. Mix, a Commissioner, with instructions,

"To proceed to the State of New York for the purpose "of negotiating a treaty with the New York Indians, "whom you are requested to meet on the 9th inst. at the "Cattaraugus Reservation, as indicated in the letter of

" George Barker, Esq., of the 26th ultimo. Herewith you " will receive the form of the treaty it is proposed to make " with the Indians referred to, and you will endeavor to " impress upon their minds the necessity which exists for " their consenting to its terms," etc.

The treaty was not concluded, owing to the disturbance of a few disaffected Indians. (See 1st Record Court of Claims, 120. Ex. Doc., No. 1, 28 Cong. 2 Sess., p. 188.)

28.

December 6, 1864.

(Ex. Doc. No. 1, 28 Cong. 2 Sess., p. 188.) The Secretary of the Interior, J. P. Usher, in his annual report to the President and to Congress with reference to the treaty of Buffalo Creek, the aforesaid appointment of Commissioner Mix, to settle by treaty the claims of the appellants, said :

" Directions having been given for the surveying and " sale of the lands in Kansus *belonging* to the New York " Indians, without *first* providing for the *extinguishment of* " *their title*, the Indians were *of course*, dissatisfied, made " urgent appeals for compensation or indemnity for this " *spoliation. Their claims being undeniable and just*, I ap- " pointed a Commissioner," etc.

This, from the officer at the head of the Interior Department, having in custody the records, is undeniable evidence of the existence and validity of the treaty, the justice of the appellant's claim, and that there had been a wrongful seizure of the lands without just compensation. This was 23 years after the ratification of the treaty—showing there had been no abandonment, settlement, rescision or waiver on the part of the appellants.

29.

December 5, 1866.

The Commissioner of Indian Affairs—Cooley—in his

annual report of this date at p. 61, says, among other things: "In my opinion the New York Indians have a "just and valid claim arising out of the treaty of Buffalo "Creek. I trust that Congress will, by legislation, pro- "vide for an equitable settlement of this claim."

30.

November 30, 1868.

The President, recognizing the obligations of the United States, and their duty to pay the New York Indians a just indemnity, and to secure a release of their title to the Kansas lands, on this day appointed Hon. Walter R. Irving, a commissioner to proceed to New York and negotiate a settlement with said Indians. His instructions were in part as follows: (See 1st Recd. Court of Claims, p. 123. Ex. Doc. Y., p, 10, 40 Cong., 3 Sess.)

"To negotiate a treaty or treaties with the Senecas and "other New York Indians.

"It is presumed that these Indians desire to remain in "the State of New York. If you find such to be the case, "you will endeavor to negotiate a treaty or treaties by "which their claims arising under the treaties of 1838 and "1842 may be satisfied.

"To provide for this, stipulations can be made for the "issue and disposition of certificates for land made locat- "able upon any of the unoccupied public lands of the "United States, in satisfaction of the claims of the Indians "under the treaties of 1838 and 1842, or by appropriation "by Congress for the same purpose, or in the alternative, "as you may think proper," etc.

"In pursuance of these instructions," etc.

31.

December 4, 1868,

A treaty was made and concluded between the United

States and the New York Indians of the Six Nations, in and by which the United States agreed to pay to the New York Indians, including the Wisconsin Indians, $320 for each soul, including half-breeds, which would have made a sum of over $2,500,000.

This treaty with all the proceedings are set forth in Ex. Doc. Y., p. 1 to 10, 40 Cong., 3 Sess. A copy filed in the Court of Claims, January 8, 1894.

This treaty failed of ratification before March 3d, 1871, when Congress enacted what is now Section 2079 of the Revised Statutes, which is as follows, to wit:

"Section 2079. No Indian nation or tribe within the "territory of the United States shall be acknowledged or "recognized as an independent nation, tribe or power with "whom the United States may contract by treaty; but no "obligation of any treaty lawfully made and ratified with any "such Indian nation or tribe prior to March 3d, eighteen hun-"dred and seventy-one, shall be hereby invalidated or im-"paired." (Act March 3, 1871, C. 120, S. 1, Vol. 16, p. 566.)

The Political Department of the Government having recognized that the treaty of 1838 was in force in December, 1868, and that a just indemnity was due the claimants, the Court cannot go behind that decision. (Taylor v. Morton, 2d Curt., 454; Fellows v. Blacksmith, 19 How. 366.)

32.

It will be seen by Ex. Doc. Y. (40 Cong., 3d Sess.) p. 10, the reason why the Government did not move the Indians to their new homes. The Commissioner informed the Council Dec. 4, 1868, to wit: "The reason why the New "York Indians had not been removed to their Kansas "Reservation was because squatters had obtained possession

" of their lands, *and the United States was unable to drive* " *them off and keep them off.*"

33.

December 10, 1883.

Between 1871 and 1883 various bills were introduced into both Houses of Congress for appropriations to be made for a settlement of appellant's claim. Only one need be mentioned : the S. Bill, 467, introduced by Senator Lapham of New York.

" To provide for a settlement with the Indians who " were parties to the treaty concluded at Buffalo Creek, in " the State of New York on the 15th day of January, 1838, " for the unexecuted stipulation of that treaty."

This bill is found at p. 106 of 1st Recd. Court of Claims. This bill, by order of the Senate, June 21, 1884, with all documents appertaining thereto were sent to the Court of Claims, (Old Record 107.) A like bill, No. 7559, was introduced in the House of Representatives, March 2, 1883, by the Committee of Indian Affairs ; and by order of the House was sent to the Court of Claims, June 30, 1884. (Old Rec. pp. 169 and 108.)

These references were made under " the Bowman act," so-called, referring the claims of appellants to the Court of Claims for the investigation and determination by that Court of the facts involved in this claim.

34.

January 29, 1884.

Hon. H. Price, Commissioner of Indian Affairs, to the Secretary of the Interior, for the information of the Senate Committee on Indian Affairs, among other thing, said : (See Report, Old Record, p. 109, etc.) " The quantity of " land assigned the New York Indians, west of the State

" of Missouri, by the 2d Article of the treaty of 1838 was " 1,824,000 acres ; the amount of money agreed to be ap- " propriated by the 15th Article of the treaty was $400,000 ; " of which the sum of $13,272.85 was expended for the " removal of some 260 Indians.

" The amount paid the Tonawandas, under the treaty " of Nov. 5, 1857, was $265,000.

" The sum to be invested for these Indians under the 2d " Section of the bill is, therefore, $1,968,000—computing " the interest at five per centum up to the 5th of last " November, 26 years—the total amount required is four " millions five hundred and twenty-six thousand and four " hundred dollars. * * * * * *

" Should the bill be amended by allowing credits above " suggested, and striking out the provision for interest, the " amount required to carry it into effect would be $1,944,- " 487.15. * * * * * * * *

Referring to the 200 Indians removed under Agent Hogeboom in the spring of 1846, he says :

" These parties were removed under the direction of an " agent of the Government and from the hostility of the " white settlers, and the *failure of the Government to provide* " *them homes*, were forced to return east. * * *

" With the amendments suggested the bill *meets my* " *approval*. * * * * * * * *

" By the treaty of 1838 the six tribes of New York " Indians relinquished to the Government 500,000 acres of " valuable land in the State of Wisconsin, for which, owing " to the failure of said treaty, *they have received no considera-* " *tion*."

" It was the policy of the Government, *at that time*, to " secure the removal of all Indians to the country west of " the Mississippi," etc.

" The President never appointed a time for their removal, " as provided in the treaty, and Congress never made the " appropriation stipulated ; therefore *their failure to remove* " *did not work a forfeiture* prescribed in Article 3, as would " have been the case had the time within which the " removal must take place been fixed by the President, and " the appropriation made.

" The validity of the claims of these Indians was recog- " nized in the case of the Tonawanda band of Senecas " under the treaty of November 5, 1857, (11 Stat. 735) " before referred to, and *I see no reason why* the other tribes " should not receive the same relief."

In a report, made for the House Indian Committee, February 9, 1883, H. Price, Commissioner of Indian Affairs, among other things, said : (See Record below, p. 172.)

" Permission was given by this office for the removal of " a number not less than 250, after the five years had ex- " pired. No time was ever named by the President in " which the removal must be made or their rights to the " land forfeited ; nor was any part of the $400,000 appro- " priated, except the $20,477.50 before mentioned. It would " seem, therefore, that the United States has not performed " all the conditions precedent required by the treaty.

" In view of all the facts in the case I am inclined to " the opinion that the petition of these Indians is entitled " to some consideration.

" Should they now insist upon their right to remove and " occupy the lands under the treaty, I do not think that " the government could show such a refusal on the part of " the Indians, and such a performance of conditions on its " part as would release it from the obligations of the treaty.

" It is presumed that all the lands ceded to these Indians

" by the treaty of 1838, except that patented to the thirty-
" two Indians hereinbefore referred to, has been disposed of
" under the general laws providing for the disposition of
" the public domain, and the proceeds thereof covered into
" the Treasury of the United States. The government,
" therefore, is not now in condition to fulfill the stipula-
" tions of the treaty regarding removal, if required to do
" so, and the Indians would seem to be entitled to some
" compension in lieu thereof.

" The relief prayed for does not appear to be excessive,
" and is not for the benefit of the Indians individually, but
" for their advantage and improvement as a race.

" I think that a due consideration for them as wards of a
" powerful nation, and a liberal construction of their rights
" under treaty stipulations, require that the relief asked for
" should be granted."

These acknowledgments of the appellant's just claim to indemnity were forty-four years after the proclamation of the treaty of 1838.

35.

January 16, 1892.

The Court of Claims transmitted its findings, filed by the Court in the case to the Committee on Indian Affairs, United States Senate, by which the Court found a balance due the appellants of $1,971,295.92, a copy of which is printed in "Additional Brief" for appellants, commencing at p. 39 ; also Congressional Record, 52 Cong., 2d Sess., pp. 248 to 253.

Thereafter a bill was introduced in both houses of Congress which in terms provided relief for the claimants on

the basis of the finding of the Court of Claims, and the House Committee reported "That the amount due the In- "dians under the treaty as ascertained by the Committee "and Court of Claims is $1,971,295.92, after making all "allowances for credit in behalf of the United States. And "also in view of all the facts the committee recommend "the passage of the bill with the usual allowance of inter- "est in cases of the Indian claim and judgment of the "Court of Claims namely, 5 per cent. from the 5th day of "November, 1857." (See Senate report No. 1858 of the 56 Congress, 1st Sess., made on the 13th of July, 1892.) The Senate on considering the same bill recommended and passed the enabling act under which this Court now has jurisdiction, and after the passage of the bill by the Senate the House substituted it for its own bill and passed the same.

These manifold acts of the Executive, Legislative and Judicial Departments of the Government, extending in an unbroken line, from March 2, 1839, to January 16, 1892, —a period of about 53 years—the passage of law after law; the doing of act after act; and recognition after recognition; and acknowledgment after acknowledgment;—and in view of the admitted fact, that the Government sold all the claimant's lands,—the 500,000 acres at Green Bay, and the 1,824,000 acres in Kansas, and received the pay therefor at the rate of $1.34 an acre, (Finding 15, Recd. p. 20) and covered the same into the Treasury of the United States, and had the use of the same for more than 30 years, while the claimants have not had one penny,—forces the unchangeable conclusion that the treaty of Buffalo Creek was, and still is the supreme law of the land, and that the appellant's claim to indemnity is uncontrovertible.

It is a rule of general application that a party to a con-

tract who is in the position to set up a forfeiture, releasing him from his own stipulations set forth in the contract, he must assert his right the first opportunity and if he thereafter deals with the other party as if the contract remained in force, it constitutes a waiver. Another general rule may be stated in this connection as applicable to this case, to wit : If the loss incurred by the forfeiture is great and its enforcement seems harsh, in such instances, the Courts are inclined to seize on a slight recognition of the contract, to defeat the result of forfeiture. If this ground of defense prevails, the claimant's loss will be great and harsh, and it may be added, cruel and unjust.

When a party who urges a forfeiture as a defense for the non-performance of his own stipulations, stands in a fiduciary relation towards the other party at the time of making the agreement, the Court will be vigilent in searching the whole case for some fact, event or circumstance upon which a waiver may be properly and justly founded.

The relation of guardian and ward exists between the United States and these Indians, as this Court has repeatedly declared.

In the first treaty negotiated between the United States and these nations (1784) the United States "named them as friends and promised them protection."

In every treaty since that time this sentiment has been repeated in some form of expression. In the treaty under consideration the President declared he was "anxious to promote the *prosperity and happiness* of his red children." In the next paragraph the Indians released their title to their Wisconsin lands, and the United States promised "to

protect and defend them in the peaceable possession and enjoyment of their new homes."

Respectfully submitted.

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